



Decision Notice 087/2023

Advice relating to the nuclear deterrent

Authority: Scottish Ministers

Case Ref: 202200867

Summary

The Applicant asked the Authority whether it was consulted by the Attorney General in the preparation of the Attorney General's advice to UK Ministers about changes to the number of nuclear warheads and whether the Attorney General provided the Authority with a copy of that advice. The Authority refused to confirm or deny whether it held the information. The Commissioner investigated and found that the Authority was entitled to refuse to confirm or deny whether it held the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 18(1) (Further provision as respects responses to request); 29(1)(c) and (4) (definition of "the Law Officers") (Formulation of Scottish Administration policy etc.); 47(1) and (2) (Application for decision by Commissioner)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 29 November 2021, the Applicant made a request for information to the Authority. With reference to a statement made about the nuclear deterrent by the Secretary of State for Defence during a UK Parliamentary debate, the Applicant asked whether:
 - the Scottish Ministers (including the Lord Advocate and government law officers in their capacity as Ministers) were consulted by the Attorney General in the preparation of this advice to the UK government

- the Attorney General has provided the Scottish Ministers (including the Lord Advocate and government law officers in their capacity as Ministers) with a copy of this advice.
2. The Authority responded on 21 December 2021 that it was applying section 18(1) of FOISA and it refused to confirm or deny whether the requested information existed or was held by it. The Authority also stated that, if the information did exist or was held, an exemption under section 29(1)(c) of FOISA would apply.
 3. On 29 December 2021, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that that he did not consider that section 18(1) of FOISA could apply because it was public knowledge that Law Officers had provided advice to the UK Government on this matter. He added that the fact that the Attorney General may or may not have provided the Authority with a copy of advice did not imply that the Authority “was involved in providing advice to the UK Government” and therefore he did not consider section 29(1)(c) to be relevant.
 4. The Authority notified the Applicant of the outcome of its review on 28 January 2022. It confirmed its original response without modification.
 5. On 3 August 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. In his application, the Applicant stated that he was dissatisfied with the outcome of the Authority’s review because he considered the Authority’s decision was incorrect.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 26 September 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

9. The Commissioner has considered all the submissions made to him by the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.

Section 18(1) – neither confirm nor deny

10. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - a request has been made to the authority for information which may or may not be held by it; and
 - if the information existed and was held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and

- the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
11. Where an authority has chosen to rely on section 18, the Commissioner must establish whether the authority is justified in stating that to reveal whether the information exists or is held would be contrary to the public interest. He must also establish whether, if the information existed and were held by the authority, the authority would be justified in refusing to disclose that information by virtue of the exemptions listed in section 18.
 12. Where section 18(1) is under consideration, the Commissioner must ensure that his decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means he is unable to comment in any detail on the Authority's reliance on any of the exemptions referred to, or on other matters which could have the effect of indicating whether the information exists or is held by the Authority.
 13. In this case, the Authority argued that the information, if it existed and were held, would be exempt from disclosure by virtue of section 29(1)(c) of FOISA.
 14. It is not sufficient to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that the authority must be able to give a refusal notice under section 16(1), on the basis that any relevant information (if it existed and were held) would be exempt information under one or more of the listed exemptions. Where the exemption is subject to the public interest test in section 2(1)(b) of FOISA, the authority must also be able to satisfy the Commissioner that the public interest in maintaining the exemption outweighs any public interest there would be in disclosing any relevant information it held.
 15. The Commissioner must first, therefore, consider whether the Authority could have given a refusal notice under section 16(1) in relation to the information in question, if it existed and were held.

Section 29(1)(c) – the provision of advice by Law Officers

16. Under section 29(1)(c) of FOISA, information held by the Authority is exempt from disclosure if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The definition of " Law Officers" in section 29(4) of FOISA includes the Attorney General as well as the Scottish Law Officers.
17. The Applicant submitted, in relation to the second part of his request, that section 29(1)(c) of FOISA related purely to the provision of advice and the exemption does not cover situations where advice may be provided to or held by Law Officers but the advice has not been provided by them.
18. The Commissioner cannot agree with the Applicant on this point. The exemption in section 29(1)(c) exempts from disclosure information "relating to" the provision of advice by any of the Law Officers, and not just the advice itself.
19. In the circumstances, the Commissioner is satisfied that the exemption in section 29(1)(c) applies to both parts of the request.

The public interest test – section 29(1)(c)

20. Section 29(1)(c) is a qualified exemption, which means that the exemption is subject to the public interest test required by section 2(1)(b) of FOISA.

The Authority's view on the public interest – section 29(1)(c)

21. The Authority's view was that the information, if it existed and were held, related to the provision of advice by Law Officers (in this case, the Attorney General) and there was a strong public interest in upholding the Law Officers' Convention and in avoiding undermining that Convention. The Law Officers' Convention is, in short, that neither the fact that the Law Officers have (or have not) advised nor the content of their advice may be disclosed outside government without their consent. The Authority referred to the decision of the High Court of Justice in [HM Treasury v The Information Commissioner and Evan Owen](#), [2009] EWHC 1811 (Admin)¹, and argued that this decision supported its view in upholding the Convention.
22. Revealing whether Scottish Law Officers were consulted or were provided with a copy of the advice could affect future cases and could have a detrimental effect on consultation between Law Officers or the sharing of advice in the future.
23. The Authority acknowledged that there could be circumstances in which it is appropriate to seek consent from Law Officers to disclose advice (if it existed), but such consent would only be sought in exceptional circumstances.

The Applicant's view on the public interest – section 29(1)(c)

24. The Applicant argued that the Law Officers' Convention was not "absolutely rigid" and that information may be disclosed where there are compelling reasons for doing so. He added that the Secretary of State for Defence had already [revealed](#)² to the UK Parliament that a Law Officer had provided advice on this matter and that in other cases the UK Government had voluntarily published advice provided by Law Officers. It was his view that there was discretion to disclose Law Officers' advice when the circumstances warranted.
25. The Applicant recognised the issues surrounding the disclosure of legally privileged material, but noted that there were circumstances in which it was appropriate to disclose such material. He referred to a decision issued by the Commissioner in 2022.
26. The Applicant also submitted in his application to the Commissioner that there was a public interest in establishing how the UK government interprets its nuclear disarmament obligations under the Non-Proliferation Treaty and international law. He stated that under FOISA there is a presumption that information should be released where possible. He commented:

Although defence is a reserved matter under the terms of the Scotland Act 1998, both the Scottish Government and the Scottish Parliament have been consistently opposed to the possession, threat, and use of nuclear weapons. Under these circumstances it is reasonable for the public to know whether the Lord Advocate, as the senior Scottish law officer, was consulted by the Attorney General when formulating a UK-wide position on the legality of the UK's nuclear weapons policies.
27. He explained that the information he had requested would "shed light upon this issue and help to explain how the UK government has developed its view of obligations under international law relating to nuclear disarmament and non-proliferation." The Applicant also supplied links to and citations of sources that evidenced the "considerable interest" in this matter.

¹ <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1811.html>

² <https://www.theyworkforyou.com/debates/?id=2021-03-22d643.2>

The Commissioner's conclusion on the public interest – section 29(1)(c)

28. The courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Where information relates to the seeking and providing of advice by Law Officers, FOISA provides specific protection from disclosure under the terms of section 29(1)(c) of FOISA and the Commissioner recognises there is a strong public interest in maintaining the protection that this affords to any of the Law Officers. Section 29(1)(c) is accordingly closely connected to the Law Officers' Convention, and the case law, referred to by the Authority, acknowledges the strong public interest in maintaining this convention.
29. The Commissioner recognises that there may be circumstances where the public interest in disclosure of information is stronger than the public interest in upholding the Law Officers' Convention. It is noteworthy that this exemption is not an absolute one.
30. The Applicant has referred to, as a relevant factor, the information in the public domain that confirms that the Attorney General has advised the UK Government on this subject. The implication suggested by the Applicant is that such knowledge of the fact of advice having been given in some way lessens the strength of the argument for the application of an exemption. However, it must be noted that the Applicant's request is for whether this advice was shared with the Authority or whether the Authority was consulted by the Attorney General in the preparation of this advice. There is no public information that would answer the questions asked by the Applicant.
31. On balance, the Commissioner is not persuaded that in this particular case the public interest in disclosure of the information, if it existed and were held, would outweigh that in maintaining the exemption under section 29(1)(c). The Commissioner acknowledges the public interest in understanding the decision-making processes of the UK Government and the role that devolved administrations may or may not have in those processes. In this particular case, however, he does not accept that knowing whether, or not, the Attorney General consulted, or provided advice to, the Scottish Ministers outweighs the strong public interest in maintaining the confidentiality afforded by the Law Officers' Convention.
32. Consequently, the Commissioner is satisfied that the information requested, if it existed and were held, would be exempt from disclosure under section 29(1)(c) of FOISA and that the Authority could give a refusal notice under section 16(1) of FOISA, on the basis that the information would be exempt information.

The public interest test – section 18(1)

The Authority's view on the public interest – section 18(1)

33. In its submissions to the Commissioner, the Authority suggested that, although there had been disclosure in the UK Parliament by the UK Government that the Attorney General's advice existed, it did not necessarily follow that there can be no damage to the Law Officers' Convention by disclosure of other aspects related to the provision of that advice or inferences that may be drawn from such disclosure. It argued that there would be damage to the Law Officers' Convention.
34. The Authority added that revealing whether or not consultation with the Authority took place could have a detrimental effect on consultation or any sharing of advice between Law Officers in future.

The Applicant's view on the public interest – section 18(1)

35. The Applicant stated, in his application to the Commissioner, that there was considerable public and political interest in the UK's nuclear weapons programme and its compliance (or otherwise) with the pledge on disarmament under Article IV of the Nuclear Proliferation Treaty. He provided web links to reports quoting the UN Secretary General and other international figures on the matter.
36. The Applicant suggested that, due to differences between the legal system in Scotland and that of England and Wales, there was a public interest in knowing whether the Scottish legal officers had been consulted and provided with a copy of the Attorney General's advice.
37. The Applicant provided in depth public interest argument, some of which have been noted and referred to earlier in this decision.

The Commissioner's conclusions on the public interest – section 18(1)

38. The Commissioner notes the comments made by Mr Justice Blake (at paragraph 54) in the *HM Treasury v The Information Commissioner and Evan Owen* (cited above) that ³

Parliament intended real weight should continue to be afforded to this aspect of the Law Officers' Convention ... the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining the exemption even in the absence of evidence of particular damage.

39. The matter under consideration here is whether revealing whether the Attorney General consulted with, or provided a copy of his advice to, the Authority is contrary to the public interest.
40. While the Commissioner accepts that there is significant public interest in the UK's nuclear weapons programme, he considers, given the crucial role played by the Law Officers' Convention that, in this case, it would not be in the public interest to reveal whether the Attorney General consulted with, or provided a copy of his advice to, the Authority.
41. Consequently, the Commissioner is satisfied that the Authority was entitled to refuse to confirm or deny in accordance with section 18(1) of FOISA, whether the information requested by the Applicant existed or was held.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

³ <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1811.html>

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Daren Fitzhenry
Scottish Information Commissioner

15 August 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- ...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-
...
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
- ...

- (4) In this section-
- ...

"the Law Officers" means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).